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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1063 114

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Petitioner and Appellant below,

versus

MRS. EUGENE ADLER
Respondent and Appellee below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT—APPELLEE BELOW MRS. EUGENE ADLER

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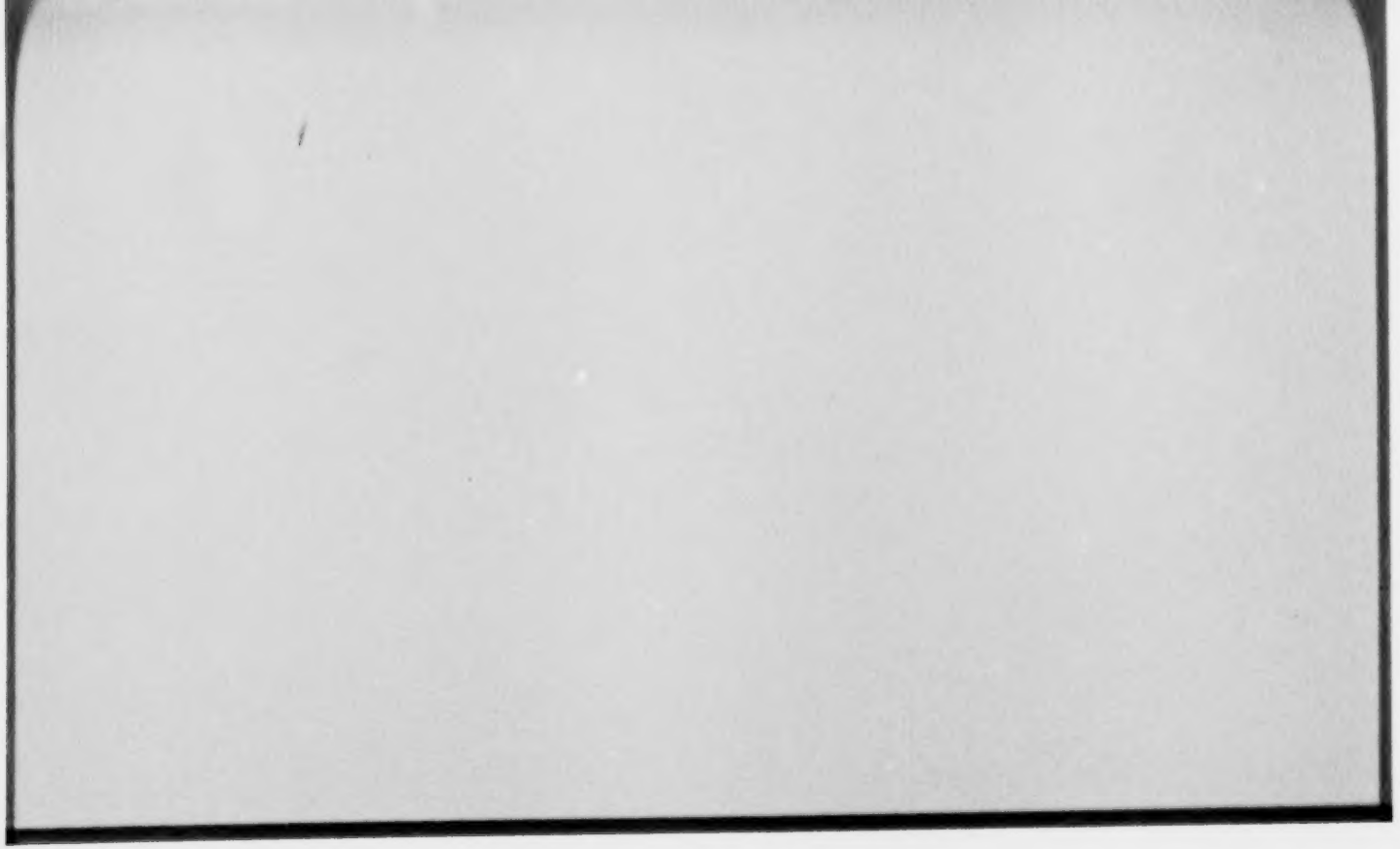

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STATEMENT OF THE CASE

On Page 2 of the petition of American Mutual Liability Insurance Company it is stated that "the place where Mrs.

Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre." The jury did not so find. We quote special interrogatory No. 3 and the answer thereto given by the jury, appearing on Page 14 of the Record:

> **"3. Do you believe and find that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre? Yes."**
> (Emphasis supplied)

Petitioner did not include in its statement of the case the fact that there was substantial evidence to the effect that terrazzo was not reasonably safe for use as a walkway when wet, and that it was raining and wet when Mrs. Adler slipped and fell with such force as to fracture her femur.

THE ISSUE

On Pages 3 and 4 of its petition, petitioner sets out its conception of the questions presented. We do not believe, and evidently the Fifth Circuit Court of Appeals did not believe, that either of those questions was presented in this case.

We agree with the statement of the Fifth Circuit Court of Appeals (*American Mutual Liability Insurance Company vs. Adler, C. C. A. 5th,* March 28, 1944, 141 F. 2nd 489, at Page 490, (Advance Sheets for Federal Reporter, Second Series, May 15, 1944) that "the only question presented is whether there was substantial evidence to support the finding of the jury that

the negligence of the theatre was the proximate cause of the fall."

ARGUMENT

It is rather difficult to determine exactly what petitioner relies upon in its attempt to convince Your Honors that you should grant a writ in this case, for apparently in its petition petitioner contends that the accident occurred entirely on a public sidewalk and that no action against the abutting property owner can be maintained, and in its brief (Pages 12 and 13, under the heading "Specification of Errors") petitioner mentions a number of questions of fact respecting which petitioner apparently disagrees with the jury and with the Fifth Circuit Court of Appeals.

In page 26 of petition and brief, petitioner sets out as "THE LAW POINT" this: "Can the defendant be held liable for an injury sustained on the sidewalk?"

We submit that no question of law whatsoever was or is presented in this case for the injury did not occur on the sidewalk. Pure and simple questions of fact only were involved, those questions were presented to the jury, and the jury resolved every one of them against the defendant.

There was dispute at the time of the trial, and some conflict in the evidence, as to the place where this 75 year old lady slipped and began her fall. Plaintiff took the position, and still contends, that since the terrazzo, which had been laid by the contractors who built the Hart Theatre in the place of concrete sidewalk which had formerly existed, was dangerously slippery, and since the terrazzo in the foyer or entrance of the Hart Theatre was also dangerously slippery, it made no difference where Mrs. Adler slipped and began her fall. We

contended and still contend that this defendant's assureds were responsible for the construction of all of that terrazzo, and that all the cases relied upon by petitioner respecting the liability of an abutting property owner have no possible application for the reason that in none of those cases had the defective condition of the sidewalk been actually caused by the abutting owner. The cases relied upon by defendant-petitioner on that point, as well as cases cited by us to show that the authorities relied on by defendant-petitioner have no application here, are all discussed in the brief filed by us in the Fifth Circuit Court of Appeals, Pages 15 to 21.

But in order to protect defendant as fully as possible, so that any conceivable question of law, if it did exist, might be presented as a pure legal question to the Court, the District Judge propounded special interrogatories to the jury, one of which required the jury to find as a fact whether or not the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre. Interrogatory No. 3 and its answer (R., 14) were as follows:

> **"3. Do you believe and find that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre? Yes."**
> (Emphasis supplied)

In view of this square and specific finding of fact of the jury we fail to see how there could be any possible error in the statement of the Fifth Circuit Court of Appeals to the effect that the only question presented was whether there was substantial evidence to support the finding of the jury that the negligence of the theatre was the proximate cause of the fall. That is purely and simply a question of fact with which we feel sure Your Honors will not concern yourselves.

Petitioner on Pages 20 and 21 of its petition and brief apparently concedes that there was conflict in the evidence as to whether plaintiff slipped and began her fall on the premises of the Hart Theatre or not, for petitioner seeks to discredit the testimony of an eye witness who had no possible interest in this case, and who testified that the fall began on the Hart Theatre premises. The only way petitioner could discredit that witness's testimony was by some involved mathematical computation based upon certain alleged isolated bits of testimony which we shall not endeavor to follow.

Since the jury found squarely and positively, on substantial evidence, that this elderly lady slipped and began to fall while on the premises occupied by the Hart Theatre, it is plain that there are no such questions presented as petitioner has set out on Pages 3 and 4 of its petition.

There is no so-called "law point."

We now call attention to some of the statements of fact made in petitioner's petition and brief with which we do not agree. The statement in Page 2 of the petition has already been referred to. The same statement, that is, that "the place where Mrs. Eugene Adler, the plaintiff, slipped and fell, was on the terrazzo pavement or sidewalk in front of the Hart Theatre" is repeated on Page 10, and is apparently repeated by implication on pages 16 and 17, of the petition and brief, and is squarely refuted by the jury's answer to special interrogatory No. 3 (R., 14).

On Page 12 and on Pages 14 and 15, and on Page 17, and on Page 31 of the petition and brief, it is stated that no person had fallen on the terrazzo either on or off the premises prior to August 31, 1941. Mr. Robert H. Hines, Manager of the

theatre, testified on two occasions to the contrary. We quote from Page 81 of the Record:

> "Q. Now, Mr. Hines, do you know of your own personal knowledge, from the time that the theatre opened up to the date that Mrs. Adler fell, whether or not any other persons had fallen in the theatre, towards the front, or on the sidewalk?
>
> A. YES, SIR, OTHER PEOPLE HAD FALLEN. How many I don't know." (Emphasis supplied.)

It is true that later Mr. Hines changed his testimony on that point, but again on Page 87 of the Record he admitted that he had given testimony under discovery on October 22, 1942, at which time his memory was better than it was when he was on the witness stand, and that in that discovery testimony he had testified:

> "Q. Do you know whether you made any such report before making this report on Mrs. Adler?
>
> A. I believe so, but I do not know positively."

The reports referred to were reports made to the defendant-insurer respecting falls on the terrazzo.

It is further stated on Page 12 of the petition and brief and again on Page 15, and again on Page 31, that the record does not conclusively establish that any person had ever fallen in the foyer of the Hart Theatre up to the date of trial on April 15, 1943. The record conclusively established, to the satisfaction of the jury, that Mrs. Adler fell there. Further, Mrs. Stella Bonnecaze testified positively that she slipped and fell and cut her eye about a month after Mrs. Adler fell, and she said (R., 146) it happened "just before you get to the side-

walk"; and on Pages 146 and 147 of the record that "I was on the Hart property I know. I hit myself against the wall", and further on Page 147 of the record "but I slipped on the floor of the Hart Theatre." Petitioner attempts to reason that because Mrs. Bonnecaze also stated that she was on Convention Street, that she could not have been on the Hart property despite the fact that she testified three times that she was on the Hart property. The Hart property was of course fronting on Convention Street and it is plain that when she said she was on Convention Street, she meant that the Hart property itself fronted on Convention Street and that she was on the Hart property.

On Page 17 of petition and brief defendant-petitioner asserts that the terrazzo contains approximately 20% of abrasive aggregate. The expert witness who exhibited a full and complete knowledge of terrazzo and its composition, and who was the only expert witness that ever examined this terrazzo when it was wet, testified positively and at several places in the record (R., 57 and elsewhere) that the terrazzo contained no abrasive aggregate whatsoever.

On Page 22 of the petition and brief, petitioner has quoted only a part of Mrs. Adler's testimony. Petitioner did not quote her testimony on Page 41 of the Record as follows:

> "Q. You are very definite and very sure that you were outside of the theatre on the sidewalk when you slipped and fell?
>
> A. **No, sir. I am not definitely sure that I was on the sidewalk."** (Emphasis supplied.)

It is hardly to be expected that this 75 year old lady, lying in the rain with a broken leg, would know exactly where she began to slip and fall with mathematical certainty. She

could hardly be expected to engage in the mathematical computation relied upon by petitioner on Pages 20 and 21 of its petition and brief.

Mrs. Elizabeth Gerding, an employee of the Theatre, whose testimony is relied upon by petitioner on Page 22 of petition and brief as definitely placing the plaintiff when she slipped and fell, admittedly did NOT see Mrs. Adler fall (R., 117). Miss Jessie Carmena did see Mrs. Adler fall, and the jury believed her testimony as it had a perfect right to do.

For some unexplained reason, petitioner quotes from paragraph 3 of plaintiff's complaint (petition and brief, Page 23) without stating that this quoted Paragraph 3 was amended as shown by Page 15 of the record. Paragraph 3 as amended is different from the original paragraph which is quoted by petitioner. Petitioner objected to the amendment, the objection was overruled, petitioner complained of that ruling in the Appellate Court, the Appellate Court said the complaint was without merit, and judging from petitioner's petition and brief filed in this Court, petitioner no longer complains of that ruling.

Since on the facts as found by the jury and approved by the Appellate Court, the plaintiff "slipped and began her fall while she was on the premises occupied by the Hart Theatre," none of the cases cited by petitioner respecting the liability of an abutting property owner for an accident occurring on a sidewalk has any possible application, and we shall not burden Your Honors with a discussion of them.

CONCLUSION

The so-called "law point" mentioned on Page 26 of petition and brief, and the questions outlined on Pages 3 and 4

of the petition, are not presented to Your Honors at all in this case for the obvious reason that the jury found as a fact, on substantial evidence, that the plaintiff slipped and began her fall while she was on the premises occupied by the Hart Theatre (R., 14). Therefore, all of the argument of petitioner respecting the liability of an abutting property owner for damages because of an injury that may occur on an adjacent sidewalk, is irrelevant. As stated by the Fifth Circuit Court of Appeals, the only question presented is whether there was substantial evidence to support the finding of the jury that the negligence of the theatre was the proximate cause of the fall, and there was an abundance of such substantial evidence. It is well settled that certiorari should not be granted to review only a question of fact, where the finding of the jury was supported by substantial evidence.

For these reasons and for the reasons stated in the original brief filed in the United States Circuit Court of Appeals for the Fifth Circuit, the defendant's petition for certiorari should be denied.

Respectfully submitted,

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